87-821

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

PITTSTON COAL GROUP, BARNES & TUCKER COMPANY, ISLAND CREEK COAL COMPANY, CONSOLIDATION COAL COMPANY, OLD REPUBLIC INSURANCE COMPANY, PENNSYLVANIA NATIONAL INSURANCE GROUP,

Petitioners,

v.

JAMES SEBBEN, JOHN COSSOLOTTO, BRUNO LENZINI, CHARLES TONELLI, WILLIAM BROCK, III, SECRETARY UNITED STATES DEPARTMENT OF LABOR, STEVEN BREESKIN, DEPUTY COMMISSIONER, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

ALLEN R. PRUNTY
JACKSON, KELLY, HOLT & O'FARRELL
1600 Laidley Tower
P. O. Box 553
Charleston, WV 25322

JOHN J. BAGNATO
SPENCE, CUSTER, SAYLOR, WOLFE & ROSE
United States Bank Building
P. O. Box 280
Johnstown, PA 15907

MARK E. SOLOMONS
Counsel of Record
JOHN D. MADDOX
LAURA METCOFF KLAUS
ARTER & HADDEN
1919 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 775-7154

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QUESTIONS PRESENTED

The Eighth Circuit's decision below requires the United States Secretary of Labor to reopen and relitigate at least 94,000, and possibly as many as 155,000, claims for benefits under the Black Lung Benefits Act, 30 U.S.C. §§ 901-945 (1982). All of these claims were finally adjudicated, denied and long ago closed, and are now barred by res judicata. The Eighth Circuit held that this drastic remedy is justified because the Secretary of Labor did not adjudicate these black lung cases under entitlement regulations that the Eighth Circuit prefers but which are inapplicable to these cases.

The questions presented are:

1. Does the Eighth Circuit have a legally proper basis under 28 U.S.C. § 1361 to invalidate tens of thousands of final black lung claim adjudications, barred by res judicata, and to require the Secretary of Labor to reopen and readjudicate these cases?
2. Is the Secretary of Labor required by the Black Lung Benefits Act to adopt a Social Security Administration regulation, 20 C.F.R. § 410.490, for determining entitlement in Department of Labor black lung claims?
3. Does the Eighth Circuit have the authority to adopt and promulgate by judicial decree a regulation for the Secretary of Labor, in disregard of the requirements of section 4 of the Administrative Procedure Act, 5 U.S.C. § 553, and of 30 U.S.C. § 936(a)?
4. Is the automatic retroactive application of 20 C.F.R. § 410.490 to previously adjudicated and closed claims involving the liability of mine owners consistent with the Due Process Clause of the Fifth Amendment to the Constitution of the United States?

LIST OF PARTIES AND RULE 28.1 STATEMENT

This case was filed in the U.S. District Court for the Southern District of Iowa as a suit for class certification and mandamus. James Sebben, John Cossolotto, Bruno Lenzini and Charles Tonelli were the plaintiffs and purported class representatives in the district court and appellants in the Eighth Circuit. Each plaintiff was an unsuccessful applicant for benefits under the Black Lung Benefits Act ("the Act"). William E. Brock, III, was the Secretary of Labor; Steven Breeskin is an employee of the United States Department of Labor having certain administrative responsibilities in connection with the black lung program. Secretary Brock and Mr. Breeskin were defendants in the district court and appellees in the court of appeals.

In the Eighth Circuit, the Pittston Coal Group, Barnes and Tucker Company, Island Creek Coal Company, Consolidation Coal Company, Old Republic Insurance Company and the Pennsylvania National Insurance Group (eollectively "intervenors") sought and were granted leave to intervene as indispensable parties on the side of the federal parties.

Intervenors are the petitioners in this Court and all other parties are respondents.

The Barnes and Tucker Company and the Pennsylvania National Insurance Group are independent entities without parent, subsidiary or other corporate relationships which must be listed under Rule 28.1 of the Rules of the United States Supreme Court. The Pittston Coal Group is a wholly owned subsidiary of the Pittston Companies. The Island Creek Coal Company is a wholly owned subsidiary of the Occidental Petroleum Corporation. The Consolidation Coal Company is a wholly owned subsidiary of the E.I. du Pont de Nemours & Company. The Old Republic Insurance Company is a wholly owned subsidiary of the Old Republic International Corporation.

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JAMES SEBBEN, JOHN COSSOLOTTO, BRUNO LENZINI, CHARLES TONELLI, WILLIAM BROCK, III, SECRETARY UNITED STATES DEPARTMENT OF LABOR, STEVEN BREESKIN, DEPUTY COMMISSIONER, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioners respectfully ask that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit filed in this proceeding on March 25, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 815 F.2d 475 (Pet. App. 1a). The Order of the Eighth Circuit denying the Government's Petition for Rehearing En Banc is unreported (Pet. App. 17a). The Orders granting intervenors' motions to intervene are unreported (Pet. App. 19a, 20a). The Order denying intervenors' Petition for Rehearing and Suggestion for Rehearing En Banc is unreported (Pet. App. 18a). The district court's Order granting defendants' Motion to Dismiss for lack of subject matter jurisdiction is unreported (Pet. App. 21a).

JURISDICTION

The decision of the Court of Appeals was filed on March 25, 1987. Timely petitions for rehearing filed by the Government and on behalf of intervenors were denied on June 25, 1987 (Pet. App. 17a) and July 24, 1987 (Pet. App. 18a), respectively. On September 17, 1987, Justice Blackmun signed Orders extending the time for both the Government and intervenors to file a petition for a writ of certiorari to and including November 20, 1987 (Pet. App. 24a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1982).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The following authorities are reprinted in the Appendix:

1. The Fifth Amendment to the Constitution of the United States (Pet. App. 25a);
2. Section 4 of the Administrative Procedure Act, 5 U.S.C. § 553 (1982) (Pet. App. 25a);
3. Section 402(f) of the Black Lung Benefits Act, 30 U.S.C. § 902(f) (1982) (Pet. App. 27a);
4. Section 422(a) of the Black Lung Benefits Act, 30 U.S.C. § 932(a) (1982) (Pet. App. 28a);
5. Section 19 of the Longshore Act, 33 U.S.C. § 919 (1982) (Pet. App. 29a);
6. Section 21 of the Longshore Act, 33 U.S.C. § 921 (1982) (Pet. App. 31a);
7. The Social Security Administration Interim Presumption, 20 C.F.R. § 410.490 (1987) (Pet. App. 34a); and
8. The Department of Labor Interim Presumption, 20 C.F.R. § 727.203 (1987) (Pet. App. 37a).

STATEMENT OF THE CASE

A. Introduction

This case is one of enormous economic significance to the U.S. coal industry, its commercial insurers and all related sectors of the national economy. The decision below, if enforced, will burden industry with as much as $13.6 billion in unanticipated and unfunded liability for the federal black lung benefits program. The decision would require the readjudication of at least 94,000 previously denied and closed claims under eligibility standards that are inappropriate for adversary claims litigation and that effectively deprive mine owners of the right to defend these claims. Remarkably, mine owners and their insurers have been all but excluded from the litigation of the issues presented here, which so dramatically affects their interests. This case is also of great significance to the Department of Labor, which is responsible for the administration and processing of the affected claims, and to the U.S. Treasury, which will be required to borrow the money to pay these claims until the coal industry is able to do so, if that day ever comes.

B. Statutory Background

The Black Lung Benefits Act,[1] 30 U.S.C. §§ 901-945 (1982) ("the Act"), establishes a program to provide benefits on account of total disability or death due to coal mine employment-related pneumoconiosis ("black lung" disease), 30 U.S.C. § 901(a). Claims for benefits filed between December 30, 1969 and June 30, 1973 were processed by the Social Security Administration ("SSA") under procedures set forth in the Social Security Act,

1. Title IV of the Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, 83 Stat. 792 (1969), *as amended by* the Black Lung Benefits Act of 1972, Pub. L. No. 92-303, 86 Stat. 150 (1972), the Black Lung Benefits Revenue Act of 1977, Pub. L. No. 95-227, 92 Stat. 11 (1978), the Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95 (1978), the Black Lung Benefits Revenue Act of 1981 and the Black Lung Benefits Amendments of 1981, Pub. L. No. 97-119, 95 Stat. 1635 (1981), and the Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 13203(a), (d), 100 Stat. 312, 313 (1986).

42 U.S.C. §§ 404-408 (1982), *incorporated by reference* into the Black Lung Benefits Act at 30 U.S.C. § 923(b). Benefits awarded for these claims, termed "Part B" claims, were paid from the U.S. Treasury. *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 8 (1976). Claims filed after December 31, 1973[2] are called "Part C" claims. *Id.* Part C claims are filed with the Secretary of Labor ("Secretary") and adjudicated under the adversarial litigation procedures set forth in sections 19 and 21 of the Longshore Act, 33 U.S.C. §§ 919, 921, incorporated into 30 U.S.C. § 932(a).[3] Benefits awarded under Part C are paid directly by a mine owner or its insurer, 30 U.S.C. §§ 932(c), 933, or by a coal industry-financed fund administered by the Secretary of Labor, 30 U.S.C. § 934.[4] By congressional design, the Part B program was intended to be a special but temporary, and exceptionally generous, remedial measure for persons who were unable to obtain redress under traditional state workers' compensation laws.[5] Part C was intended to be a workers' compensation program.[6] *See* 30 U.S.C. § 931; *see also Strike* v. *Director, Office of*

2. A six-month transition period from July 1 to December 31, 1973 required the filing of a Part B claim with SSA which was then converted to a Part C claim as of January 1, 1974. 30 U.S.C. § 925.

3. Trials in Part C claims are subject to the on-the-record hearing provisions of the Administrative Procedure Act, 5 U.S.C. § 554 (1982). 33 U.S.C. § 919(d). Appeals in Part C claims are taken first to the Department of Labor's Benefits Review Board and then to a designated U.S. court of appeals. A federal district court may enforce compliance with final orders, but otherwise has no jurisdiction to act in black lung claims. 33 U.S.C. § 921, *incorporated into* 30 U.S.C. § 932(a). *See Louisville & Nashville R. Co.* v. *Donovan*, 713 F.2d 1243 (6th Cir. 1983), *cert. denied*, 466 U.S. 936 (1984).

4. This fund is financed by a producer's tax on coal, 26 U.S.C. §§ 4121, 9501 (1982). The fund pays benefits if the miner last worked prior to January 1, 1970 or if there is no mine operator liable for the payment of benefits. 30 U.S.C. §§ 932(c), 934(a) (1982).

5. *See* H.R. Rep. No. 460, 92d Cong., 1st Sess. 5-7 (1971), *reprinted in* House Comm. on Labor and Public Welfare, Subcomm. on Labor, *Legislative History of the Federal Coal Mine Health and Safety Act of 1969, as Amended Through 1974*, at 1725, 1729-31 (1975) (discussing the purposes and intent of the Part B program).

6. Under Part C, the claimant is required to file a state claim if the state workers' compensation program in the miner's state provides adequate black lung benefits. 30 U.S.C. § 931.

Workers' Compensation Programs, 817 F.2d 395, 397 (7th Cir. 1987); S. Rep. No. 209, 95th Cong., 1st Sess. 13-14 (1977) (noting that it was "intended that traditional workers' compensation principles . . . be included within [Part C] regulations").

In both the Part B and Part C programs, a variety of statutory and regulatory presumptions aid claimants in proving entitlement. Following enactment of the Black Lung Benefits Act of 1972, Pub. L. No. 92-303, 86 Stat. 150 (1972) (codified in scattered sections of 30 U.S.C.), SSA promulgated an eligibility regulation called the "interim presumption." 20 C.F.R. § 410.490 (1987) (Pet. App. 34a). The presumption is an extremely powerful and liberal vehicle designed to effectuate the purpose of the SSA black lung program. It could not be applied in Part C claims.[7]

In 1978, Congress authorized the Secretary of Labor to write his own black lung eligibility rules,[8] and amended the Act in several other important respects. Both SSA and the Department of Labor ("Labor") were directed to review all then-pending and denied claims under revised statutory standards. 30 U.S.C. § 945. Part C claims were to be reviewed under the new Labor regulations. *See* 30 U.S.C. § 902(f)(1). The 1978 amendments provided, however, that the rules to be applied under Part C to reviewed claims and certain new claims "shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973." 30 U.S.C. § 902(f)(2).

7. The provision is entitled "Interim adjudicatory rules for certain Part B claims filed by a miner before July 1, 1973, or by a survivor where the miner died before January 1, 1974."

8. Before 1978, only the Secretary of Health, Education and Welfare (now Health and Human Services) had statutory authority to write eligibility rules. *See* Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, §§ 401, 411, 83 Stat. 793 (1969). The Secretary of Labor had no regulatory authority in this regard. HEW refused to apply the interim presumption to Department of Labor claims, believing that it would be constitutionally impermissible to apply the interim rules in claims involving mine owners. H.R. Rep. No. 151, 95th Cong., 1st Sess. 15-19 (1977), *reprinted in* House Comm. on Education and Labor, *Black Lung Benefits Reform Act and Black Lung Benefits Revenue Act of 1977*, at 508, 522-26 (Comm. Print 1977) [hereinafter *1977 Legislative History*].

In response to these amendments, the Secretary of Labor promulgated a Part C version of the interim presumption at 20 C.F.R. § 727.203 (1987) (Pet. App. 37a). The Part B and Part C presumptions are similar, but not identical.[9] The Labor presumption *cannot* be invoked unless the miner was engaged in coal mine work for at least ten years. *Id.* § 727.203(a). The SSA presumption requires fifteen years of mine employment for invocation on the basis of ventilatory tests, *see* 20 C.F.R. § 410.490(b)(1)(ii) (1987). Invocation based upon an abnormal chest x-ray, biopsy or autopsy is possible if the miner worked for ten years *or*, absent ten years employment, if the miner is able to prove that the abnormal x-ray, biopsy or autopsy was caused by coal dust exposure,[10] *see id.* § 410.490(b)(2). The Labor rule is in some respects more favorable to Part C claimants because it permits invocation on grounds not available to Part B claimants. *See id.* § 727.203(a)(3)-(5).[11]

Rebuttal differences in the two programs are far more dramatic. The Labor/Part C presumption may be rebutted by direct medical proof that the miner neither died from nor was totally disabled by black lung disease. *Id.* § 727.203(b). The SSA/Part B presumption cannot be rebutted by medical evidence; it is not clear that it can be rebutted at all unless the miner is still working. *Id.* § 410.490(c). *Compare id. with id.* § 727.203(b); *see Cook* v. *Director, Office of Workers' Compensation Programs*, 816 F.2d 1182, 1184 (7th Cir. 1987); Comptroller General of the U.S., *Report to the Senate Comm. on Human Resources: Program to Pay Black Lung Benefits to Coal Miners and Their Survivors—Improvements Are Needed* 43-47 (1977).

9. There is a substantial body of legislative history indicating that identical provisions were neither intended nor contemplated. *See, e.g.*, H.R. Rep. No. 864, 95th Cong., 2d Sess. 16, *reprinted in* 1978 U.S. Code Cong. & Admin. News 309, 325; 124 Cong. Rec. 2333, 3431 (1978) (statements of Sen. Javits and Rep. Simon), *reprinted in 1977 Legislative History*, *supra* note 8, at 909, 929.

10. Although the SSA regulation clearly presents the alternatives noted, it is not clear that, as a mater of agency practice, SSA permitted invocation of its presumption by x-ray evidence absent ten years of coal mine employment. *See, e.g., Dickson* v. *Califano*, 590 F.2d 616, 618-21 (6th Cir. 1978).

11. A claimant's failure to invoke the presumption does not result in an automatic denial of the claim. Any claimant may obtain benefits by providing direct proof of total disability or death due to black lung disease.

After promulgation of the 1978 rules, the Secretary of Labor applied the new Part C interim presumption in approximately 424,000 claims. *Problems Relating to the Insolvency of the Black Lung Disability Trust Fund: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 97th Cong., 1st Sess. 186 (1981) [hereinafter *1981 Oversight Hearings*].

C. Background of This Litigation

In 1982, the Third Circuit held that the Part C rule is more restrictive than the Part B rule because it precludes invocation by x-ray, biopsy or autopsy evidence absent ten years of mine employment. Because the Part B rule could be invoked by a miner with fewer than ten years of employment, the court concluded that the Part C rule violated 30 U.S.C. § 902(f)(2). *Halon* v. *Director, Office of Workers' Compensation Programs*, 713 F.2d 30 (3d Cir. 1982). The *Halon* court directed Labor to apply the Part B presumption in a Part C/Labor claim. *Id.* at 31. On rehearing, two members of the panel reaffirmed the original decision invalidating the Labor regulation. *Halon* v. *Director, Office of Workers' Compensation Programs*, 713 F.2d 21 (3d Cir. 1983). In a strong dissent, Judge Weis surveyed the Act's extensive legislative record and declared that the Department of Labor's regulation was valid because Congress did not intend to preclude Labor from imposing a ten-year requirement. *Id.* at 25-30.

The *Halon* rule and 20 C.F.R. § 410.490 have been applied by the Labor Department in active or pending cases arising within the jurisdiction of the Third Circuit.

In 1985, the Eighth Circuit adopted the Third Circuit's holding and rationale in *Halon*. *Coughlan* v. *Director, Office of Workers' Compensation Programs*, 757 F.2d 966, 968 (8th Cir. 1985). After *Coughlan*, section 410.490 has been applied in all pending

cases within the jurisdiction of the Eighth Circuit. Neither *Halon* nor *Coughlan* directed the Secretary to apply section 410.490 retroactively to previously closed cases or to apply it in cases arising in other circuits.

D. Background of This Case

Shortly after the *Coughlan* decision, four black lung claimants filed suit in the U.S. District Court for the Southern District of Iowa seeking nationwide class certification and a writ of mandamus under 28 U.S.C. §§ 1361, 1651 (1982) to compel the Secretary of Labor to reopen all previously denied and closed Part C cases and readjudicate them under section 410.490. On February 6, 1986, the district court granted the Secretary's motion to dismiss because (1) *Coughlan* imposed no duty on the Secretary to readjudicate previously closed cases under section 410.490, and (2) the district court had no subject matter jurisdiction to consider black lung claims in which the plaintiffs had failed to exhaust administrative remedies. (Pet. App. 22a.)

On March 25, 1987, the Eighth Circuit reversed, holding that the Secretary had a clear nondiscretionary duty to apply section 410.490 to Part C claims and had failed to do so in many previously denied and closed cases (Pet. App. 11a). Further, analogizing this case to *Bowen* v. *City of New York*, 106 S. Ct. 2022 (1986), the court held that statutory finality requirements could be waived by the court under appropriate circumstances and that the Secretary's failure to follow Congress's mandate to apply section 410.490 justified a waiver in this case (Pet. App. 13a, 15a-16a).

The Eighth Circuit directed the district court to certify the class, which was to comprise all previously denied claimants who had originally filed for benefits between December 30, 1969 and April 1, 1980 and who were denied adjudication under section 410.490 because they had not worked for ten years in the coal

mines[12] (Pet. App. 16a). The Secretary was instructed to reopen and individually readjudicate under section 410.490 each claim within the class.

No mine operator or insurer was a party to the suit. Mine owners' counsel were notified informally of the Eighth Circuit's decision by Government counsel. Two groups of owners and insurers filed separate motions to intervene as indispensable parties[13] and for leave to file a petition for rehearing; these motions were granted. Intervenors argued, among other things, that *Coughlan* was wrongly decided and that the views of the real parties in interest with respect to this matter had never been considered. The Government has obtained a stay of the judgment of the Eighth Circuit pending the filing and disposition of petitions for certiorari.

REASONS FOR GRANTING THE WRIT

By requiring the retrial of tens of thousands of closed claims under section 410.490, the decision of the Eighth Circuit will dramatically and permanently upset the fiscal and administrative stability of the black lung program. Through the course of amendments enacted in 1978, 1981 and 1985, Congress and the Department of Labor have made a substantial effort to develop a program which is uniquely generous to claimants but still affordable and fair to the coal industry. The Eighth Circuit's decision strips these efforts of meaning and purpose. The court's errors are many, and all are serious.

The Eighth Circuit's decision conflicts directly with the decisions of other circuits in two respects and conflicts in principle with decisions of this Court. Its mandate is a matter of staggering economic significance to mine owners, and deprives them of the right to litigate questionable and non-meritorious claims.

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12. An additional criterion is that the claimant have submitted at least one positive chest x-ray. Virtually all claimants have done so or would be able to do so if given the opportunity.

13. The motion filed by the Pittston Coal Group, *et al.*, was filed on behalf of movants and all others similarly situated.

I.
DIRECT CONFLICTS AMONG THE CIRCUITS ARE PRESENTED

The underlying substantive question presented is whether the Secretary of Labor was required to adopt all of the provisions of the SSA interim presumption when the Part C interim presumption was promulgated. A finding that the Secretary was not required to do so, and that 20 C.F.R. § 727.203[14] is a valid rule—even though the presumption it contains may not be invoked by a short-term coal miner and even though it is fully rebuttable—disposes of this case entirely.[15]

The circuits do not agree on whether, or to what extent, the SSA presumption applies in Department of Labor claims. The

14. On October 14, 1987, this Court heard oral argument in a case involving the standard of proof imposed for invocation of the Labor interim presumption, 20 C.F.R. § 727.203. *Mullins Coal Co.* v. *Director, Office of Workers' Compensation Programs*, No. 86-327, *cert. granted*, 107 S. Ct. 871 (1987). The disposition in *Mullins* will affect the impact of the outcome here, but will not resolve the questions presented here.

15. The Questions Presented, *supra*, p. i, ask this Court to determine the validity of the Secretary's regulation. The regulation is valid. Its validity is presumed. *Boske* v. *Comingore*, 177 U.S. 459, 470 (1900). That presumption stands unrebutted. The Act confers broad authority on the Secretary to write eligibility rules, 30 U.S.C. § 902(f)(1) (1982). The Secretary interpreted the Act to permit promulgation of a regulatory presumption that (1) requires ten years or more of employment for invocation, and (2) is fully rebuttable by relevant evidence. The Secretary's interpretation of the Act in the rule at 20 C.F.R. § 727.203 is entitled to substantial judicial deference in the setting presented. *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944). All traditional rules of deference in this controversial and technically complex area lend weight to the Secretary's views. *See United States* v. *Larionoff*, 431 U.S. 862, 872 (1977); *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 134 & n.25 (1977). The Secretary's rule draws additional support from the legislative history of the Act. *See Halon* v. *Director, Office of Workers' Compensation Programs*, 713 F.2d at 25-30 (Weis, J., dissenting). Any ambiguity in the legislative history does not detract from the validity of the rule. *Heckler* v. *Campbell*, 461 U.S. 458, 466 (1983). The fact that Congress has twice implicitly ratified the rule also carries considerable weight. *See Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969). Finally, and perhaps most compelling, the Secretary was obligated to write a rule which preserves fairness in adversary litigation. This factor has been completely ignored by each of the courts that have invalidated the Secretary's rule.

Eighth Circuit has held that the invocation and rebuttal provisions of section 410.490 must be applied in Part C claims, concluding that "the ALJ and BRB erred in failing to evaluate the evidence . . . under the criteria contained in 20 C.F.R. § 410.490." *Coughlan* v. *Director, Office of Workers' Compensation Programs*, 757 F.2d at 968. The Third Circuit has directed application of the invocation portion of the SSA rule if the miner had fewer than ten years of mine employment. *Halon* v. *Director, Office of Workers' Compensation Programs*, 713 F.2d at 24-25. The court recently extended this holding to encompass the rebuttal provisions of section 410.490(c) as well. *Sulyma* v. *Director, Office of Workers' Compensation Programs*, 827 F.2d 922, 924 (3d Cir. 1987).

The Seventh Circuit has specifically rejected the holdings of the Third and Eighth Circuits, stating:

> We cannot agree with the conclusion reached by these two courts. . . .
>
> [W]e hold that the Secretary of Labor was not obligated by [30 U.S.C.] § 902(f)(2) to incorporate the provision in § 410.490 . . . . We appreciate that the Part C interim presumption may yield different results than the Part B presumption for miners with fewer than ten years of coal mine employment. From their inception in 1969, however, the Part B and Part C programs were intended to be separate and distinct.

Strike v. *Director, Office of Workers' Compensation Programs*, 817 F.2d 395, 400, 405 (7th Cir. 1987).[16]

The Sixth Circuit has followed the *Halon* rationale, rejecting the Secretary's rule and applying the SSA rule to Labor claims. *Kyle* v. *Director, Office of Workers' Compensation Programs*, 819 F.2d 139, 142-43 (6th Cir. 1987). In a dissent, Judge Guy

16. Because of the conflict created by this decision, the opinion was circulated in accordance with Seventh Circuit Rule 40(f). No judge favored rehearing en banc. 817 F.2d at 396. The Seventh Circuit's decision was issued on April 16, 1987. On September 29, 1987, the claimant moved to vacate the court's decision on the grounds that the original notice of appeal filed with the Seventh Circuit was untimely; this motion is pending.

agreed with the dissenting rationale of Judge Weis in *Halon*, and would have upheld the validity of the Labor rule. More recently, however, the Sixth Circuit has indicated that it will not apply the Part B rebuttal provisions to Part C claims. *Prater* v. *Hite Preparation Co.*, 829 F.2d 1363, ___ n.2 (6th Cir. 1987); *see also Kyle*, 819 F.2d at 143-44.

Finally, the Fourth Circuit has held that both the invocation and rebuttal provisions of the SSA rules apply to Labor claims. *Broyles* v. *Director, Office of Workers' Compensation Programs*, 824 F.2d 327, 329 (4th Cir. 1987). In an apparent departure from the arguably more limited holdings of the Third, Sixth and Eighth Circuits, the Fourth Circuit's decision in *Broyles* indicates that the SSA rule must be applied in all Labor claims if it produces a more favorable result for the claimant. *Id.*

Apart from the section 410.490 controversy, the Eighth Circuit's decision in the case at hand presents another direct split in authority among the circuits. The court held that a claimant's failure to timely pursue administrative remedies does not deprive the court of jurisdiction and that the Black Lung Act's time limitations may be waived for cause.

All other circuits to address these issues have held that the Black Lung Act's time limitations are jurisdictionally based and may not be waived for any reason.[17] Further, the circuits have uniformly precluded claim litigants from seeking relief outside the exclusive statutory scheme provided by the Act. *Louisville & Nashville R. Co.* v. *Donovan*, 713 F.2d 1243 (6th Cir. 1983), *cert. denied*, 466 U.S. 936 (1984); *Compensation Dep't of Dist. Five* v. *Marshall*, 667 F.2d 336, 340 (3d Cir. 1981). The Eighth Circuit has departed significantly from longstanding circuit court

17. *See Arch Mineral Corp.* v. *Director, Office of Workers' Compensation Programs*, 798 F.2d 215, 217 (7th Cir. 1986); *Midland Ins. Co.* v. *Adam*, 781 F.2d 526, 528 (6th Cir. 1985); *see also Bennett* v. *Director, Office of Workers' Compensation Programs*, 717 F.2d 1167, 1169 (7th Cir. 1983); *Wellman* v. *Director, Officer of Workers' Compensation Programs*, 706 F.2d 191, 193 (6th Cir. 1983); *Insurance Co. of North America* v. *Gee*, 702 F.2d 411, 414 (2d Cir. 1983) *Pittston Stevedoring Corp.* v. *Dellaventura*, 544 F.2d 35, 43-44 (2d Cir. 1976), *aff'd on other grounds sub nom. Northwest Marine Terminal Co.* v. *Caputo*, 432 U.S. 249 (1977).

law by excusing the plaintiffs here from their obligation to exhaust administrative remedies and by opening the doors of the district courts to them.

The supervisory powers of this Court are urgently required to restore uniformity among the circuits in black lung claims litigation.

II.
THE DECISION BELOW IS INCONSISTENT WITH DECISIONS OF THIS COURT AND RAISES A VARIETY OF IMPORTANT QUESTIONS CONCERNING THE POWERS OF COURTS AND AGENCIES AND THE FUNDAMENTAL RIGHTS OF CLAIM DEFENDANTS

A. Mandamus is Not a Proper Remedy

Under the decisions of this Court, a writ of mandamus may not issue to compel agency action "[w]here judgment or discretion is reposed in an administrative agency and has by that agency been exercised." *United States ex rel. Chicago Great W. R. Co.* v. *ICC*, 294 U.S. 50, 60 (1935). This remedy is restricted "in the main, to situations where ministerial duties of a nondiscretionary nature are involved. . . . [W]here the duty to act turns on matters of doubtful or highly debatable inference from large or loose statutory terms, the very construction of the statute is a distinct and profound exercise of discretion." *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309, 318 (1958). These fundamental rules have not changed. *Heckler* v. *Ringer*, 466 U.S. 602, 616-617 (1984).

Here, the Act provides:

> The term "total disability" has the meaning given it by regulations of the Secretary of Health and Human Services for claims under Part B of this subchapter, and by regulations of the Secretary of Labor for claims under Part C . . . except that . . . [c]riteria applied by the Secretary of Labor [in the cases at issue here] shall not be more restrictive than the criteria applicable to [certain Part B claims].

30 U.S.C. § 902(f)(1), (2) (1982). In light of certain legislative statements and other factors, including public proceedings, the Secretary reads the terms "total disability" and "criteria" in section 902(f) to require the promulgation of some, but not all, of SSA's section 410.490 rule. *See Strike* v. *Director, Office of Workers' Compensation Programs*, 817 F.2d at 400-04; *Halon* v. *Director, Office of Workers' Compensation Programs*, 713 F.2d at 25-30 (Weis, J., dissenting). This classic exercise of discretion by the Department of Labor is plainly not subject to the mandamus powers of the courts. The Eighth Circuit's holding to the contrary defies the decisions of this Court.[18]

B. No Court May Promulgate a Substantive Rule for an Agency

Section 410.490 is not a Labor Department rule. It was promulgated by SSA for application in SSA claims only. The only interim presumption applicable to Labor claims is 20 C.F.R. § 727.203, which the Secretary of Labor promulgated in response to its mandate to write black lung eligibility criteria, *see* 30 U.S.C. § 902(f)(1) (1982).

The decisions of this Court make clear that, while courts may review the validity of agency rules, they may not take the additional step of rewriting a rule or dictating that an alternative rule must apply. *See Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77, 97 (1981). For a court to promulgate such rules "runs the risk of 'propel[ling] the court into the domain which Congress has set aside exclusively for the administrative agency.'" *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council*, 435 U.S. 519, 545 (1978) (citations omitted).

The Black Lung Act specifies that the Labor Secretary's rules "shall be issued in conformity with section 553 of Title 5" of the

18. It is doubtful whether any agency regulator has a nondiscretionary duty to promulgate a substantive rule applicable in hundreds of thousands of matters according to a court's prescription. Moreover, a litigant's failure to exhaust administrative remedies precludes the exercise of mandamus in a collateral proceeding. *Heckler* v. *Ringer*, 466 U.S. at 616.

United States Code. 30 U.S.C. § 936(a) (1982). The Eighth Circuit not only has written a substantive new regulation for Part C claims in contravention of the decisions of this Court, but also has totally disregarded Congress's mandate that APA procedures be followed.

C. The Court Below Clearly Erred in Reopening Thousands of Cases Barred by Res Judicata

These cases cannot be reopened in a collateral proceeding for two reasons: (1) Longshore Act remedies are exclusive and do not permit access to alternative avenues of relief; and (2)their relitigation is barred by the rule of res judicata.

The statutory procedures for the adjudication of black lung claims are complete, comprehensive and exclusive. The Longshore Act provides that "[p]roceedings for suspending, setting aside, or enforcing a compensation order, whether rejecting a claim or making an award, *shall not be instituted* otherwise than as provided in [33 U.S.C. §§ 918 and 921]." 33 U.S.C. § 921(e) (1982) (emphasis added). *See also id.* §§ 919, 921 (establishing claims adjudication procedures), *incorporated by reference* into the Black Lung Act at 30 U.S.C. § 932(a) (1982). This language divests both the district and circuit courts of collateral jurisdiction to fashion alternative avenues of relief for litigants who have been unsuccessful in their pursuit of the exclusive remedies designated by Congress. *See Whitney Nat'l Bank* v. *Bank of New Orleans and Trust Co.*, 379 U.S.411, 420 (1965); *Crowell* v. *Benson*, 285 U.S. 22, 46 (1932); *see also* cases cited *supra* p. 12 & n.17.

Each claim subject to reopening by the decision below has been adjudicated and denied. These denials are final, and the relitigation of their merits is barred. The rule of res judicata is properly applied to administrative decisions of agencies acting in a judicial capacity. *University of Tennessee* v. *Elliott*, 106 S. Ct. 3220, 3226-27 (1986); *United States* v. *Utah Constr. and Mining Co.*, 384 U.S. 394, 421-22 (1966). Exceptions to this rule may not be fashioned to further a court's view of proper "public policy" or

"simple justice." *Federated Dep't Stores, Inc.* v. *Moitie*, 452 U.S. 394, 401 (1981). "There is simply 'no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of *res judicata*.'" *Id.* at 401-02 (citation omitted).

The Eighth Circuit had no valid reason to simply cast aside tens of thousands of final agency decisions,[19] nor to mandate the retroactive application of section 410.490 to these cases.

Claimants clearly have no constitutional right to benefit from section 410.490.[20] Application of this rule to Part C claims is merely judge-made law that has evolved through the course of litigation and interpretation of the statute. The interpretation itself is not at all uniformly accepted by the courts that have considered it. The claimants who would compose the class did not exhaust their administrative remedies, and their cases are closed. In this setting, a fair reading of the decisions of this Court noted herein prohibits the reopening and relitigation of the tens of thousands of cases, by writ of mandamus or otherwise. *See Heckler* v. *Ringer*, 466 U.S. at 616; *see also Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 88 (1982).

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19. The court below relies exclusively on *Bowen* v. *City of New York*, 106 S. Ct. 2202 (1986), for dispensing with res judicata. This holding is inapposite for two reasons. First, it draws authority solely from provisions of the Social Security Act which do not apply in Part C black lung claims. Further, *Bowen* was an exceptional case in which retroactive application was necessary to remedy the significant adverse impact of an SSA policy which was deliberately hidden from the affected population of claimants. *Id.* at 2230-31. In *Bowen*, the persons affected could not have asserted their rights, not knowing that their rights were in jeopardy. In the instant case, the Secretary's regulation was published in the *Federal Register* and applied openly in all of the affected black lung cases. If a claimant found the rule legally objectionable, there was more than ample opportunity to challenge it in the course of ordinary claim proceedings. *See e.g., Lynn* v. *Director, Office of Workers' Compensation Programs*, 3 Black Lung Rep. (MB) 1-125 (Ben. Rev. Bd. 1981).

20. Any claimant may obtain benefits on direct proof of eligibility. Here, the claimants, whose direct proof failed to establish entitlement, seek the burden of proof advantage of section 410.490. In civil litigation, the allocation of proof burdens is "not an issue of federal constitutional moment." *Lavine* v. *Milne*, 424 U.S. 577, 585 (1986).

D. The Eighth Circuit's Decision Raises Legitimate Due Process Concerns

Legitimate due process concerns arise from the Eighth Circuit's decision requiring application of a rule of evidence, section 410.490, which was neither designed nor intended for use in true adversarial litigation. As a practical matter, section 410.490 does not contemplate either the presentation or consideration of defensive evidence. As a legal matter, it does not permit the adjudicator to consider a substantial portion of the defensive evidence which can be produced by a mine operator. *See Sulyma* v. *Director, Office of Workers' Compensation Program*, 827 F.2d at 924; *Broyles* v. *Director, Office of Workers' Compensation Programs*, 824 F.2d at 329-30; Cook v. *Director, Office of Workers' Compensation Programs*, 816 F.2d at 1184. When this rule is applied, evidence that is clearly relevant to whether the miner has pneumoconiosis or is disabled by the disease becomes completely irrelevant. A miner who is not working or is unable to work, for whatever reason, is almost guaranteed black lung benefits, whether he worked in coal mining for one year or for fifty. *Id.; see also Adkins* v. *United States Dep't of Labor*, 824 F.2d 287, 289-90 (4th Cir. 1987); *Roberts* v. *Benefits Review Bd.*, 822 F.2d 636 (6th Cir. 1987); Sykes v. *Director, Office of Workers' Compensation Program*, 812 F.2d 890, 894 (4th Cir. 1987).

Further, the ten-year rule for invocation of a rebuttable presumption is justified by congressional findings; a rule that abolishes the ten-year requirement is not.[21] *See Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. at 29. Use of the section 410.490 presumption is particularly troubling because benefits are awarded to claimants on the basis of evidence which, according to fairly uniform testimony provided to Congress, often proves nothing at all. *See Halon* v. *Director, Office of Workers' Compensation Programs*, 713 F.2d at 26-28 (Weis, J., dissenting); *see also*

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21. In a study published by Congress, the National Institute of Occupational Safety and Health reported that 99.3% of miners with fewer than ten years of exposure showed no evidence of black lung disease. *1981 Oversight Hearings*, *supra* p. 7, at 32 (attachment to statement of Dr. J. Donald Millar, Director, National Institute for Occupational Safety and Health).

Comptroller General of the U.S., *Report To The Congress: Legislation Allows Black Lung Benefits To Be Awarded Without Adequate Evidence Of Disability* 8 (1980) (reporting "in 88.5 percent of the cases [awarded under the SSA rule], medical evidence was not adequate to establish disability or death from black lung").

The Eighth Circuit's interpretation oversteps the boundaries of due process by compelling a result that makes an operator's rights to defend even non-meritorious cases a sham. A right to present a party's case must have some meaning. *Brock* v. *Roadway Express, Inc.*, 107 S. Ct. 1740, 1749 (1987); *Landon* v. *Plasencia*, 459 U.S. 21, 36 (1982). "[T]he Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged." *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982). A presumption which is a purely arbitrary mandate is not compatible with due process of law. *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. at 28.

Under the Eighth Circuit's interpretation of the Act, mine owners retain the right to a hearing, and may appear to present their side of the case, but what they say and the evidence they present matter hardly at all. The novel due process question presented is significant.

III.

THE COST OF THE DECISION BELOW WILL BE CATASTROPHIC FOR THE COAL AND INSURANCE INDUSTRIES

All benefits paid under Part C are paid directly or indirectly by mine owners and their insurers. 30 U.S.C. §§ 932(a), 933, 934 (1982). The Government estimates that the decision will require 94,000 retrials. Motion to Stay Issuance of Mandate at 5-6. Depending upon certain factors, the number could exceed 155,000. *See 1981 Oversight Hearings, supra* p. 7, at 7, 102, 186 (prepared statements of Morton E. Henig, U.S. General Accounting Office; Sam Church, Jr., President, United Mine

Workers of America; Charles Coakley, Counsel, American Insurance Association).

The average cost of a single black lung claim has been estimated by the Department of Labor to range from approximately $118,000 to more than $186,000. U.S. Dep't of Labor, *1980 Annual Report on Administration of the Black Lung Benefits Act* 32 (1981). Insurance industry actuaries estimate that the cost of the decision below in indemnity benefits alone will be from $4.7 billion to $13.6 billion.[22] Added to the cost of indemnity benefits are litigation expenses of from $5,000 to $10,000 per claim and the administrative and debt service costs incurred by the Department of Labor, all of which mine owners also must pay. 30 U.S.C. § 934(a)(4), (5) (1982). Additional billions in liability are implicated by the application of section 410.490 in active cases. The Benefits Review Board has already remanded hundreds of active cases for retrial under section 410.490.

Congress has devoted substantial effort to making the black lung program affordable. The Eighth Circuit's observation that it was compelled to reopen all closed cases so that "[i]t should not be necessary for Congress to pass a third act requiring the Secretary to reconsider these claims" (Pet. App. 10a) misinterprets Congress's purposes. Congress had opportunities in 1978, 1981 and 1985 to address the very issues that concern the Eighth Circuit; each time, it has refused to do so.[23]

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22. The lower estimate applies if section 410.490 is applied according to the Sixth Circuit's formula, which limits applicability to claims involving ten or fewer years of mine work and does not apply the section 410.490 rebuttal provisions. The higher estimate applies if the Third or Fourth Circuit's approach is used and section 410.490 is applied in *all* cases with respect to both invocation and rebuttal. The Eighth Circuit's approach is more closely allied with those of the Third and Fourth Circuits.

23. *See* H.R. Rep. No. 241, 99th Cong., 2d Sess. 75-76, *reprinted in* 1986 U.S. Code Cong. & Admin. News, 653-54; House Comm. on Ways and Means, Subcomm. on Oversight, *Report and Recommendations on Black Lung Disability Trust Fund*, 97th Cong., 1st Sess. 16-30 (Comm. Print 1981); S. Rep. No. 336, 95th Cong., 1st Sess. 8-9 (1977), *reprinted in 1977 Legislative History*, *supra* n.8, at 986, 993-94; Letter from Rep. Carl D. Perkins, Rep. John H. Dent and Rep. Paul Simon to Robert B. Dorsey (May 25, 1978) (Pet. App 41a).

The enormous liabilities that will flow from the Eighth Circuit's decision are intolerable to the affected industries and inconsistent with Congressional intent. These additional liabilities would arise from a decision that (1)improperly strips the Secretary of Labor of his justified exercise of discretion in the publication of eligibility regulations; (2)erroneously finds that the process of writing complex eligibility regulations is a proper subject for mandamus jurisdiction; (3) impermissibly rewrites an agency rule; (4) ignores time-honored principles of res judicata; (5) applies, without any adequate precedent, a new judge made rule to long since closed cases; and (6) deprives claim defendants of any reasonable rights to be heard.

CONCLUSION

This Petition for Writ of Certiorari should be granted.

Respectfully submitted,

/s/ MARK E. SOLOMONS

MARK E. SOLOMONS
Counsel of Record
JOHN D. MADDOX
LAURA METCOFF KLAUS
Arter & Hadden
1919 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 775-7154

ALLEN R. PRUNTY
Jackson, Kelly, Holt
& O'Farrell
1600 Laidley Tower
P. O. Box 553
Charleston, WV 25322

JOHN J. BAGNATO
Spence, Custer, Saylor,
Wolfe & Rose
United States Bank
Building
P. O. Box 280
Johnstown, PA 15907